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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
Appellant,

vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN ET AL.
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

I.

Opinion of the Court.

The opinion of the Three-Judge District Court, convened pursuant to Section 380 of Title 28 of the United States Code Annotated (Judicial Code Section 266, as amended) for the Eastern District of Michigan, Southern Division, denying an interlocutory injunction and dismissing the appellant's bill of complaint as amended and supplemented, is reported in 21 Fed. Supp. 969 (In Equity No. 8269, R. 36).

II.

Statement of the Case.

On December 10, 1937, the appellant, a manufacturer of beer duly licensed to import into and sell in the State of Michigan, whose brewery was located within the State of Indiana, brought an action of injunction on its own behalf and as a class suit on behalf of all the manufacturers of beer similarly situated against the Liquor Control Commission of the State of Michigan, and against each of the individuals comprising the same as members of said Commission and individually, and against the Attorney General of the State, to enjoin the enforcement of Section 40 of Act No. 8 of the Public Acts of the State of Michigan of the Extra Session of 1933, 1934, page 18 (as amended by Act No. 281 of the Public and Local Acts of the Legislature of that State passed in the Regular Session of 1937, page 509), hereinafter called amended section 40, and also to enjoin the enforcement of a regulation of the Liquor Control Commission of that State dated December 14, 1937, which under the color of amended Section 40 designated the State of Indiana and certain other States as having laws declared discriminatory by amended Section 40. The appellant claimed in its bill as amended and supplemented that amended Section 40 and the regulation adopted pursuant thereto were repugnant to the Commerce Clause of the Federal Constitution in that the same imposed a burden upon interstate commerce not within the dispensation contained in the Commerce Clause and accorded to the states by the Second Section of the Twenty-first Amendment, and deprived the appellant and other manufacturers of beer, being persons in the appellant's class and also the customers of the appellant, of property, business, good-will, rights, immunities and privileges belonging to them without due process of law and denied them equal protection of the law, all

exceeding any dispensation accorded to the State of Michigan by reason of the Twenty-first Amendment.

That portion of Section 40, namely the last paragraph thereof, which is material to an understanding of this cause, reads:

> "The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possession, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety-days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its findings with respect to any state."

(The full text of Section 40 and the title of the Act containing Section 40 are set out in Exhibit A.)

The regulation of the Liquor Control Commission of December 14, 1937 is as follows:

> "Pursuant to Act No. 8, Public Acts, Extra Session of the year 1933 of the State of Michigan, as amended

by Act No. 241 of the Public Act for the year 1935, and Act No. 281 of the Public Act for the year 1937, particularly Section 40 thereof, the Michigan Liquor Control Commission promulgates and adopts the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: MAINE, MARYLAND, NEVADA, INDIANA, NEW HAMPSHIRE, NORTH CAROLINA, PENNSYLVANIA, TENNESSEE, VERMONT, WASHINGTON. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states."

The court below denied the appellant's request for an interlocutory injunction and dismissed its bill as amended and supplemented (R. 41, 50).

A.

Appellant's Bill of Complaint as Amended and Supplemented.

Appellant's original bill of complaint was filed December 10, 1937 (R. 1), and was thereafter supplemented on December 27, 1937 (R. 21).

There were also filed in support of the bill asking for an interlocutory injunction certain affidavits of Carl Frey and Harold Feignter (R. 31), substantially identical with Clause H of amended bill of complaint quoted as to material matters hereafter in argument.

It is to be noted that by virtue of the specific finding of the court noted below the allegations of appellant's bill as amended and supplemented and the affidavits just mentioned, were found to be true and constitute the trial courts finding of facts.

Appellant, in its bill as amended and supplemented, charged the several matters above set forth under this statement of facts. More particularly, the bill charged that the appellant was an Indiana corporation and a citizen and resident of that State, duly licensed to import and sell beer

in Michigan and that the defendants were charged, under the laws of Michigan, with the enforcement of the acts complained of and was vested with the sole power and duty to control the alcoholic malt traffic and administer the laws and statutes of the State of Michigan relating thereto and that each of the defendants is a citizen and a resident of that State residing in the District and Division where this suit is brought. (R. 1, 2, 3).

Appellant alleged and exhibited its license to do business within the State of Michigan and that its customary method of doing business in the latter State was to sell the beer of the appellant manufactured in Indiana on written telegraphic and telephonic orders from the appellant's customers licensed wholesalers and retailers in Michigan and pursuant to said orders to deliver to the customers' respective places in the latter State, the alcoholic malt beverages so manufactured by the appellant and purchased from it and that the approximate value of the appellant's business in each of the years 1935 and 1936 and the first ten months of 1937 was $40,000. (Clause 3, C and 4 of Bill, R. 4, 5).

Under the bill, jurisdiction of the court was predicated upon the diversity of citizenship and the fact that the controversy exceeded, exclusive of interest and cost, the sum of $3000 and that the proceeding was a suit of a civil nature in equity; jurisdiction was also invoked because of the alleged invalidity of Amended Section 40 and the regulation issued thereunder; the invalidity of said legislation and regulation was predicated on the violation of Section 8, of Article One (The Commerce Clause), the Fourteenth Amendment of the Constitution of the United States, Section 10 of Article One and Section 2 of Article Four of the Constitution of the United States and that the challenged Act was not within the dispensation accorded to the State of Michigan under the Second Clause of the Twenty-first Amendment. (R. 26, 27, 28, 29, 30, Clause G.)

The appellant charged that interstate commerce from Indiana into the State of Michigan was being unduly and unlawfully burdened by amended Section 40 and that appellant's established business and good-will was being taken without due process of law and that likewise the business and good-will of its patrons, the licensed wholesalers and retailers within the State of Michigan, were being taken without due process of law; and that by reason of the unreasonable and unconstitutional classification created by said amended Section 40 and the regulation thereunder the appellant, persons in the appellant's class and the said customers of the appellant were being denied the equal protection of the law (R. 29, 30, Clause G).

The appellant charged that the threat of the Commission to adopt and promulgate the regulation and to enforce Section 40 was intimidating and deterring appellant's customers and the customers of persons in the appellant's class from making further orders of appellant's goods and that it would also cause its customers loss and depreciation of the good-will and property which such customers had built up in handling the goods of the appellant and that all of said damage was incapable of measurement and would result in great, immediate and continuous loss.

The bill as amended and supplemented charged, particularly in Clause G, that the Act in question was not a lawful exercise of the sovereignty of the said State of Michigan and exceeded the power and authority of the State under the Twenty-first Amendment to the Constitution of the United States or by virtue of any permission or grant of power thereunder and that the classification thereby created was unjust, unreasonable, and arbitrary and without any discernible public object or relation to the control of the liquor traffic of the State of Michigan and charged that amended Section 40 constrained and hampered the State

of Indiana and the other States of the Union in the enactment and enforcement of laws relating to their domestic policy in respect to the alcoholic traffic contrary to the constitutional relationship of the States.

The constitutional objections were set forth in great detail and particularly in Clause G of the bill as amended and supplemented.

The factual situation with reference to the importation of beer into the State of Michigan was set out with some detail in Clause H of the bill as amended and supplemented, as appears *infra* in the argument, at pages 30, 31, 32 and 33. of this brief.

As the court below necessarily adopted this statement of facts when it found that the allegations of the bill as amended and supplemented were true, we now summarize this portion of appellant's bill.

During the fiscal year ending June 30, 1937 the ten States designated in the Michigan regulations as having laws which resulted in the exclusion from Michigan of the alcoholic malt products of these States, had the number of breweries and manufactured the number of barrels of beer now set out;

State.	Number of Breweries.	Barrels.
Indiana	17	2,254,490
Maryland	12	1,338,893
Nevada	2	21,388
New Hampshire	1	58,824
North Carolina	1	82,293
Pennsylvania	109	6,614,907
Tennessee	3	155,952
Washington	17	915,391
Vermont	0	0

That certain States not designated in the regulation and which, consequently, did not have laws preventing the im-

portation of their alcoholic malt products into the State of Michigan, had the number of breweries and manufactured the amount of beer respectively now set out;

State.	Number of Breweries.	Barrels.
Illinois	62	4,059,423
Kentucky	7	986,039
Missouri	20	3,442,809
New York	69	9,230,725
Ohio	55	4,281,448
Wisconsin	86	6,448,420

It is further charged that during the first nine calendar months of the year 1937 there were in all 603,241 barrels of beer produced outside of and imported into the State of Michigan and that during the first ten calendar months of said year only 145,250 barrels of beer in Indiana was shipped into Michigan and that substantially all of the 603,241 barrels of foreign beer imported into the State of Michigan, excepting that part just described as being imported from the State of Indiana, were produced and shipped from the States of Illinois, Missouri, Ohio, and Wisconsin which did not have laws resulting in the exclusion of their beer under said Section 40 and that the States of Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee and Washington, designated in the regulation excluding the beer produced in said States, imported substantially no beer into the State of Michigan and that none whatever was imported into Michigan from the State of Vermont which was designated in the regulation.

That in the same period the amount of beer imported into the State of Michigan produced in other States of the Union than Michigan amounted to about 20 per cent of the total amount of beer consumed in Michigan and that Illinois, Missouri, Ohio and Wisconsin, not desig-

nated in the said regulation and which did not have laws obnoxious to the Michigan standards, *produced and imported into the State of Michigan in excess of two-thirds of the total amount imported into the State of Michigan during said period,* and that these States had breweries "capable of producing and importing into the State of Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan."

The bill further charged in Clause H:

> "That in truth and fact the type of liquor control statute described in said amended Section 40 herein complained of has no bearing or relation to the amount of beer produced in any of the said states and shipped into the State of Michigan and the fact whether or not laws of any of said states contain provisions which require or do not require the exclusion of beer produced therein under said Section 40 has no bearing upon or relation to the amount of beer produced therein and shipped into the State of Michigan (R. 32).

The accompanying affidavits supported the allegations of the Bill with substantially the same statistics.

B.

The Record of the Court's Finding of Facts.

The last sentence in the first paragraph of the opinion of the court below reads as follows: "No answer having been filed—the defendants moving to dismiss—we find the facts, so far as necessary to decision, as alleged in the bill and its accompanying affidavits" (R. 36).

Thereafter this appellant filed a written motion for more specific findings of facts (R. 42) and the court below entered the following order:

"It appearing that there are no issues of fact presented since no answer has been filed and no evidence received, and since in our opinion heretofore filed we have made the general finding that we accept the facts as stated in the bill of complaint and amendments and the affidavits attached thereto, and have made therein such detailed findings as bear upon the legal and constitutional issues, and since our conclusions of law are with sufficient particularity set forth in the said opinion.

"The petition for special finding of fact and conclusions of law is hereby denied" (R. 51).

Consequently, by the foregoing declaration of the trial court, the original bill of complaint as amended and supplemented and the affidavits accompanying the same were found to be true and became the court's finding of facts upon which its decision below was based.

No point was made by appellee as to any deficiency in substance in the Bill or in the proof offered in support thereof. The only issue is upon the constitutionality of the challenged Act.

Jurisdiction.

The jurisdiction of this Court to hear these appeals depends upon the Act of Congress of June 18, 1910, Chapt. 309, Sec. 17, 36 Stat. 557; March 3, 1911, Chapt. 231, Sec. 266, 36 Stat. 1162; March 4, 1913, Chapt. 160, 37 Stat. 1013; February 13, 1926, Chapt. 229, Sec. 1, 43 Stat. 936-938 (28 U. S. C. A., Sec. 380).

An order noting probable jurisdiction of these appeals was made by this Court October 10, 1938.

The appeal was duly taken within the required statutory period, the decree being entered on March 5, 1938, and the application for appeal presented on April 27, 1938, and the appeal papers duly lodged in this Court within the time duly enlarged by the court below.

No question is made by the appellees as to the jurisdiction of this Court except that the questions have been determined by the *Youngs Market* and *Joseph Triner* cases, which are distinguished in the argument *infra*.

Appellee's Motion to Dismiss.

Appellee moved to dismiss on substantially these grounds:

1. That Michigan had authority within the limits of the Twenty-first Amendment to enact amended Section 40, and the laws of Indiana brought that State properly within the designation required by the Act.

2. That the Twenty-first Amendment abrogated the right to import intoxicating liquors free.

3 and 4 respectively negatived the claim that Section 10 of Article I and Section 2 of Article IV of the Federal Constitution were violated.

5. That the Fourteenth Amendment was not violated; and that appellant was a foreign corporation not admitted to do business in Michigan and for that reason could not claim the benefit of the equal protection clause (R. pp. 33, 34, 35).

III.

Specification of Errors.

1. The court erred in dismissing appellant's bill of complaint.

2. The court erred in holding that the State of Michigan had the power under the Second Section of the Twenty-first Amendment to enact Amended Section 40 described in the Bill and to adopt, under the authority thereof, the regulation of the Liquor Control Commission of that State dated December 14, 1937.

3. The court erred in holding said Amended Section 40, and the said regulation not repugnant to the Commerce lause of the Federal Constitution, namely, Section 8 of Article I thereof.

4. The court erred in holding the challenged Act and regulation did not each violate the due process and equal protection clauses of the Federal Constitution.

5. The court erred in holding that the challenged Act and regulation did not deny to appellant the equal protection of the laws contrary to the Fourteenth Amendment.

6. The court erred in holding that the State of Michigan had power under the Twenty-first Amendment to enact the challenged Act without violating the equal protection and due process clauses of the Fourteenth Amendment.

7. The court erred in holding the Twenty-first Amendment of the Federal Constitution dispenses with the application and operation of the Commerce Clause and Fourteenth Amendment of the Federal Constitution in respect to the challenged Act notwithstanding its sole object is the promotion of the sale of beer produced in Michigan throughout other States by means of economic retaliation.

Summary of Argument.

The Second Section of the Twenty-first Amendment of the Constitution of the United States provides:

> "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The challenged Michigan statute, Section 40 of Public Act No. 8 of the Public Acts of the Extra Session of the Michigan Legislature of 1933, as amended by Act No. 281 of the Public Acts of 1937 of that State, hereafter referred

to as amended Section 40, requires the Liquor Control Commission of Michigan to adopt a regulation prohibiting all licensees of that State from purchasing, receiving, possessing or selling any beer manufactured in any State designated in the regulation; and any State must be designated in such regulation if the laws of such State contain one or more of the provisions described in the Act. The presence of one or absence of all these four provisions described in the Act becomes the criteria for the admission or exclusion of the beer manufactured in such State.

The challenged Act forbidding the importation of beer from States having certain laws can be upheld only if it falls within the dispensation accorded to the States by Section 2 of the Twenty-first Amendment, for otherwise it is clearly repugnant to both the Commerce Clause and the Fourteenth Amendment.

State Board of Equalization v. *Youngs Market Co. et al.* (1936), 299 U. S. 59, 62;
Mahoney v. *Joseph Triner Corporation*, — U. S. —, Vol. 82, Law Ed. Advance Opinions No 17, 961, 962;
Bowman v. *Chicago, etc., Railway Co.* (1888), 125 U. S. 465, 507;
Leisy v. *Harden* (1890), 135 U. S. 100, 109, 124;
In re Rahrer (1891), 140 U. S. 545, 559;
Rhodes v. *Iowa* (1898), 170 U. S. 412, 419, 423.

An analysis of the amended Section 40 of the Michigan Act discloses that it operates to exclude from Michigan beer manufactured in States which have taken advantage of the Second Section of the Twenty-first Amendment in order to channelize separately the streams of imported and domestic beer or to differentiate in the regulation of imported and domestic beer, declared proper under this Amendment by the decisions in the *Youngs Market* and *Joseph Triner* cases, *supra*.

Essentially the Michigan Act retaliates against any State making use of the dispensation of the Twenty-first Amendment and seeks by economic reprisal to coerce its sister States from having recourse to the Amendment.

That the Michigan Act is designed to coerce the States of the Union in the manner just described clearly appears from: (a) The criteria of exclusion described in the Act; (b) The facts found by the trial court; (c) The discussion in the opinion of the trial court; (d) The propaganda published in support of this type of legislation.

Plainly, this retaliatory type of legislation strikes directly at the integrity of the Twenty-first Amendment itself. The Amendment cannot be invoked to accomplish its own nullification. The words "*laws thereof*" appearing in this Amendment should not be held to include a law intended to inhibit the several States of the Union from having recourse to the advantages conferred upon them by the Amendment itself.

It plainly appears that while the immediate object of the Michigan Act is to constrain its sister States to abandon the enactment of statutes permitted under the Second Section of the Twenty-first Amendment the advantage thereby anticipated to flow to the State of Michigan is the augmentation of the stream of exported beer from that State. The Twenty-first Amendment, however, was not adopted for the purpose of promoting the export of beer from one State into another, nor to implement the constraint of a sister State by economic reprisal to admit into its territory a larger stream of foreign beer than such State would, with an eye single to its police interests, otherwise admit.

Certain controlling principles of constitutional construction become pertinent. Constitutional provisions will not be construed so as to defeat their purposes. Literalism should be avoided and an Amendment, even though couched

in sweeping and apparently all embracing language, is to be construed with reference to the original provisions of the Constitution and not in such manner as will strike down unnecessarily pre-existing principles contained in the Constitution which it was not the intention of the people at the time of the Amendment wholly to abolish; and, likewise, a construction raising a conflict between parts of the Constitution is inadmissible when, by reasonable interpretation, the parts may be made to harmonize.

These principles cast upon the court the duty of reconciling the new constitutional amendment with both the commerce clause and the Fourteenth Amendment and so far as a function or necessity remains for the operation of the latter provisions, they should be held effective to such extent as is not incompatible with the objects intended to be accomplished by the Twenty-first Amendment and especially to the extent that such provisions may supplement it.

The adoption of the Twenty-first Amendment was not induced by any sentiment of dissatisfaction with the operation of the commerce clause or the Fourteenth Amendment in respect to the prevention of trade wars between the States and the economic self-aggrandizement of the States by commercial reprisal or retaliation. The so-called "anti-discrimination" bills, now being promoted by a concerted movement, of which the recent Michigan and Missouri statutes are types, have as their aim the practical nullification of the Second Section of the Twenty-first Amendment by coercing, through threats of economic reprisal, the legislatures of the several States to forego the exercise of the dispensation thereby accorded.

The commerce clause and the Fourteenth Amendment have still a legitimate scope to effectuate the salvation of these provisions of the Twenty-first Amendment, especially as there has been no express repeal of the commerce clause

or the Fourteenth Amendment in respect to their application in the proper case.

The historic purposes of the commerce clause are threefold; to prevent petty annoyances to interstate traffic, to preserve the harmonious relationship between the States, and to prevent the erection of economic barriers. Occasion still remains for the exercise of the last two suggested functions of the commerce clause in respect to the interstate alcoholic traffic. Both these two historic purposes of the commerce clause as well as the provisions of the Twenty-first Amendment are national desiderata, and in the light thereof the new Amendment and the older provisions of the Constitution should be reconciled to carry out the purposes of the Constitution enumerated in its preamble, "* * * to form a more perfect Union * * * insure domestic tranquillity * * * promote the general welfare * * *" and in accordance with the traditional attitude of this Court which has many times resolutely set its face against tolerating economic barriers and trade wars between the States.

Gulf C. & S. F. R. Co. v. *Ellis,* 165 U. S. 150, 165;
Sioux Remedy Co. v. *Cope,* 235 U. S. 197, 201;
Baldwin v. *Seelig,* 294 U. S. 511;
Western Union Telegraph Co. v. *Kansas,* 216 U. S. 1, 27;
Brimmer v. *Rebman,* 138 U. S. 78, 82, 83;
Brown v. *Houston,* 114 U. S. 622, 630;
Darnell & Son v. *Memphis,* 208 U. S. 113;
Philadelphia etc., Mail Steamship Co. v. *Pennsylvania,* 122 U. S. 326, 341;
Foster-Fountain Packing Co. v. *Haydel,* 278 U. S. 1, 13;
Pennsylvania v. *West Virginia,* 262 U. S. 553, 593;
Coyle v. *Smith,* 221 U. S. 559, 567, 580;
Atchison, Topeka & Santa Fe R. Co. v. *Mathews* (1899), 174 U. S. 96, 105;
Cotting v. *Godard,* (1901) 183 U. S. 79, 112;

Connolly v. *Union Sewer Pipe Co.* (1902), 184 U. S. 540, 558, 560, 563;
Louis K. Liggett Co. v. *Baldridge* (1928), 278 U. S. 105, 113;
Colgate v. *Harvey*, 296 U. S. 404, 423;
McCormick & Co. v. *Brown*, 286 U. S. 131, 139, 141;
Mugler v. *Kansas*, 123 U. S. 623;
Mayflower Farms v. *Ten Eyck* (1936), 297 U. S. 266, 272, 273, 274.

The line of demarcation, plainly foreshadowed in the opinion of this Court rendered by the late Mr. Justice Cardozo in *Baldwin* v. *Seelig*, 294 U. S. 511, 523, and in many earlier precedents, is based upon the primary purpose of the legislation involved, whether essentially designed to protect the domestic policy from out-of-State interference or for the primary purpose of exploiting out-of-State markets through economic retaliation.

If the purpose or effect of the challenged legislation is to subvert the Twenty-first Amendment or if the classification made by the challenged legislation is inconsistent or in conflict with the classification made by the Twenty-first Amendment, both the commerce clause and the Fourteenth Amendment apply.

Not only is the classification of the Michigan Act subversive of the Twenty-first Amendment but it provides a classification that is not "recognized" under the *Youngs Market* and *Joseph Triner* cases by the Amendment, because the Amendment can not be presumed to contemplate its own nullification. Besides, the classification of the Michigan Act is, factually, essentially dissimilar to the classification in the California and Minnesota statutes held valid in the last mentioned cases.

If amended section 40 of the Michigan Act is subversive of the Twenty-first Amendment, then such legislation is

"derogatory to that mutual comity and respect which ought to prevail between the state and Federal government", for it is a Federal constitutional amendment which the legislation of Michigan seeks to reduce to a state of "innocous desuetude" under the cases holding that although the power of a State is plenary to admit or refuse to admit foreign corporations to engage in intrastate business within its confines, nevertheless, a state may not use its characteristic powers to bring about an unconstitutional result.

If the legislation of Michigan seeks to obstruct the operation or impair the integrity of the Twenty-first Amendment, since the public welfare of a State cannot transcend the public welfare of the Nation, the legislation is without a discernible public object and violates the Fourteenth Amendment.

It has been held that the power of Congress over interstate commerce is subject to the provisions of the Fifth Amendment. Likewise the power of a State over interstate commerce must be subject to the provisions of the Fourteenth Amendment.

In addition to the rights of the appellant and those persons of its class, the appellant is entitled to assert successfully that its business is being destroyed through the infringement of the constitutional rights of its customers, the licensed wholesalers and retailers of the State of Michigan.

Pierce v. *The Society of Sisters of the Holy Names* (1925), 268 U. S. 510, 535, 536;
Terrace v. *Thompson* (1923), 263 U. S. 197;
Truax v. *Raich* (1915), 239 U. S. 33, 43;
Truax v. *Corrigan* (1921), 257 U. S. 312.

Since the appellant is duly licensed to engage in interstate commerce in alcoholic liquors under the laws of Michigan, it is, although a corporation of the State of Indiana,

entitled to claim the equal protection of the laws while engaging in interstate commerce.

Kentucky Finance Corp v. *Paramount Auto Exch. Corp.* (1923), 262 U. S. 544;
Frost v. *Railroad Commission*, 271 U. S. 583, 593, 594;
Quaker City Cab Co. v. *Pennsylvania* (1928), 277 U. S. 389, 400;
Louisville v. *Cumberland T. & T. Co.* (1912), 224 U. S. 649;
Fletcher (Cyc. Corp.) (Perm. ed) Sec. 8422.

Since the appellant bases its suit challenging amended Section 40 and the regulation adopted thereunder upon the invalidity thereof under the Constitution of the United States, appellant was not obliged to resort to the administrative provisions of the Act or to the State courts in advance of the proceedings in the Federal court and the Federal court had jurisdiction to entertain the action without such resort first having been had.

Risty v. *Chicago, etc.* (1926), 270 U. S. 378, 388;
Turner, etc. v. *Chicago, M. & St. P. R. R. Co.* (1926), 271 U. S. 259, 262.

> "That appellant's business is a property right, and as such entitled to protection against state legislation in contravention of the Federal Constitution, is of course, clear." *Liggett Co.* v. *Baldridge* (*supra*).

Argument.

Amended Section 40 of the Michigan Act requires the Liquor Control Commission of Michigan to adopt a regulation prohibiting all licensees of that State from purchasing, receiving, possessing or selling any beer manufactured in any State designated in the regulation and that a State be designated in such regulation if the laws of such State

contain one or more of the provisions declared obnoxious in the Michigan Act.

Pursuant to this Act the Liquor Control Commission of Michigan adopted on December 14, 1937, a regulation designating the States of Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont and Washington as having laws described in amended Section 40.

The appellant's bill of complaint, filed December 10, 1937, charged that the Commission was intending to adopt the foregoing regulation and that the defendants as law enforcing officers of the State of Michigan were intending and threatening to enforce and carry the regulation and challenged Act into execution and that the appellant's business and the business of manufacturers in the appellant's class and of their customers, the licensed wholesalers and retailers of Michigan, were being visited with immediate and irreparable loss of business and good-will from the mere adoption as well as from the intended enforcement of the Act and regulation. After the adoption of the regulation on December 10th, a supplemental bill was filed on December 20th, and further amendments thereto were filed on December 27, 1937, reciting the intervening events and showing the actual adoption of the regulation and resulting and continuing damage to the good-will and business of the appellant and its customers.

There is no question that the interference with interstate shipment of beer in the manner provided in the challenged Act and regulation was originally prohibited both by the Commerce Clause and the Fourteenth Amendment.

State Board etc. v. *Youngs Market Co., supra;*
Bowman v. *Chicago, etc., Railway Co.* (1887), 125 U. S. 507;
Leisy v. *Harden* (1889), 125 U. S. 100, 109, 124;

In re Rahrer (1891), 140 U. S. 545, 559;
Rhodes v. *Iowa* (1898), 170 U. S. 412, 419, 423;
United States v. *Chicago, Milwaukee & St. P. & P. Railway Co.* (1930), 282 U. S. 311, 327, and cases cited;
Railroad Retirement Board v. *Alton Railroad Co.* (1934), 295 U. S. 330, 347.

There is no dispute in the present case that the challenged Act and the regulation thereunder must depend for their validity upon whatever dispensation may be accorded to the States from the operation of the Commerce Clause and the Fourteenth Amendment of the Federal Constitution by the provisions of the Second Clause of the Twenty-first Amendment, which reads as follows:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Purpose of the Twenty-first Amendment.

The appellant insists that the dispensation accorded to the States by the Second Section of this Amendment can not be invoked to achieve objects which, in the light of the history of Congressional legislation and of the adoption of the Amendment, it was not intended to achieve, and, further, that the provisions of the Twenty-first Amendment can not be construed to uphold legislation which is subversive of the Amendment itself.

The appellant maintains that it is easily demonstrable, in the light of the history of national legislation and constitutional amendments on the subject of alcoholic beverages, as appears in authoritative precedents and documents, that it was not the purpose of the Second Section of the

Twenty-first Amendment to promote the *exportation* of alcoholic beverages from one State into another.

We first refer to the Congressional debate upon the proposed provisions of the Twenty-first Amendment. Senator Blaine, of Wisconsin, a member of the Judiciary Committee to which the resolution for the amendment of the Constitution had been referred, said:

> "First, however, we had what is known as the Wilson law. That law was treated in the case of Rhodes *v.* Iowa, 170 U. S. 412; but the Supreme Court in that case gave a restricted construction of the language used by Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actually been delivered to the consignee. . . . The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of Clark Distilling Company *v.* Western Maryland Railway, 242 U. S. 311. The language of the Webb-Kenyon Act was designed to give the states in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the state; and the Supreme Court held that it was following the doctrine laid down in the case of Rhodes *v.* Iowa, and necessarily must follow that doctrine in order to sustain the decision it was making in the case of Clark against Maryland Railroad Company.
>
> "In the case of Clark against Maryland Railway Company there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry states against the importation of intoxicating liquor into those states, it is proposed to write permanently into the Constitution a prohibition along that line."

The purpose of Section Two is to restore to the States by Constitutional Amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States.

Senator Borah, in discussing the proposed language of the Twenty-first Amendment, declared:

> "Mr. President, I wanted to say that this question of the right of the States, *in the exercise of the police powers to control the liquor traffic within the States*, was fairly and squarely presented in many cases to the Supreme Court, always a portion of the court contending that the police power should be permitted to be exercised by the States to the full extent within the boundaries of the States. * * * The people had declared they wanted to be rid of this evil, or at least to control it their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for State's rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local self government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provision of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment." (Our italics above.)
>
> "All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." (Vol. 76, Congressional Record, p. 4172.)

Senator Robinson referred to the foregoing remark of Senator Borah, declaring:

> "The language of Section 2 is perfectly plain (Quoting same.) That leaves to the State the power of regulation; it places the moral force of the government of the United States behind the State in the enforcement of their laws; * * *. (Vol. 76, Congressional Record, p. 4225.)

The celebrated case, *Clark Distilling Company* v. *Western Maryland Railway*, 242 U. S. 311, 320, 324, construing the Webb-Kenyon Act, was expressly referred to in the remarks of Senator Blaine, quoted above.

We quote from the opinion of Chief Justice White, who delivered the opinion of the Court:

> "* * * there is no room for doubt that it (Webb-Kenyon Act) was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught."

The Webb-Kenyon Act and the decision of the Supreme Court of the United States construing that Act were thus conspicuously in the minds of the framers of the Amendment.

Both from the language of Chief Justice White and the historic fact that the Webb-Kenyon Act was passed in a period of increasing restraint of the alcoholic traffic, it is indisputable that the purpose of the Webb-Kenyon Act was not to promote the exportation of beer from one State into another or to implement one State in constraining another by economic pressure to alter or abandon the latter's system of domestic control. So far, therefore, as the Second Section of the Twenty-first Amendment may be imbued with the spirit of its legislative prototype it seems clear that the promotion of out of State sales of beer was not one of its purposes.

The Purpose of the Michigan Act.

However, the criteria of exclusion set up in the Michigan Act, the finding of facts by the court below and the published propaganda in support of this type of legislation,

as well as the utter inaptness and unrelatedness of the Michigan Act to the establishment or enforcement of any domestic policy of that State, make obvious the purpose of this Act to constrain the sister States of Michigan through economic pressure to forego the dispensation accorded to them by the Twenty-first Amendment to enact statutes and regulations concerning the liquor traffic with an eye single to the police necessities of such States, to coerce such States to alter or abandon statutory provisions obnoxious to the Michigan Act, and to cause beer to flow into these States the same as any other commodity regardless of the provisions of the Twenty-first Amendment and thus to enable the sale of Michigan beer to be promoted throughout the States of the Union.

An analysis of the Act and examination of the factual situation and of the propaganda referred to, will in detail support this position of the appellant.

Analysis of the Michigan Act.

Amended Section 40 provides four standards, all based upon the presence or absence of the described statutory provisions in the State of the origin of the beer.

The first standard requires the exclusion of beer if the State of its origin is found:

> "to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state;"

Consequently, if another State, on account of greater difficulty of policing the stream of foreign beer as compared to domestic beer, deems it necessary to impose an additional fee, however trivial the fee may be, upon the right to sell the foreign product, the sale in Michigan of beer produced in such State is doomed. Thus, so far as the first standard of exclusion operates, providing in effect that if the sister State

combines in one person as a wholesaler the right to handle domestic beer and also foreign beer, it can not make one charge for the importing privilege and another for the domestic privilege, even though the charge for the importing privilege is far smaller than for the domestic privilege. In other words, the Legislature of Michigan says to the other States of the Union: "You must either make a single charge for both privileges or you must charge only for the privilege of handling domestic beer, otherwise your beer will be excluded from Michigan."

Thus Michigan insists that its sister States are not free to accord even equal treatment to domestic beer as compared to imported beer in any regulatory system providing for wholesalers with combined privileges except at the hazard of having their beer banned from Michigan. This provision is not aimed at any discrimination against Michigan beer but is in the nature of a pre-emptory order to the sister States to comply with the peculiar desires of the Legislature of Michigan which are in no sense related to the regulation of the liquor traffic within Michigan.

The second standard excludes beer originating in a State which denies:

> "the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license;"

This standard is even sterner, more inexorable and unrelated to the domestic policy of the State of Michigan than the first standard. This standard prohibits a sister State from channelizing, specifically held proper in the *Youngs Market* case, domestic beer and foreign beer in separate channels excepting at the hazard of having its local beer thereby automatically excluded from shipment into Michigan. This is a plain demand on certain sister States to alter their laws establishing their present system of police control to conform to the views of the Legislature of Michi-

gan, because evidently the Legislature of Michigan considers that the sale of Michigan beer in such sister States would be promoted by the abolition of the separate systems for the sale of foreign and domestic beer. If the sister States refuse to comply, the Michigan Act automatically effects reprisal and retaliation.

It may be noted at the same time that the statute of Michigan leaves open to importation into Michigan "bootleg" beer from a prohibition State, so far does this Act depart from any concern about the domestic policy of the State.

It is by virtue of these first two standards of exclusion contained in the Michigan Act that the beer manufactured in Indiana is excluded under its terms.

The laws of Indiana do not exclude foreign beer but channelize separately to a modified degree the streams of foreign and domestic beer. An Indiana wholesaler with a Port of Entry permit may import out-of-State beer and sell the same throughout the 92 counties in the State but must pay an additional license fee of $1500 per annum over and above the license fee of $1000 which he pays as a wholesaler without the right of importation, and must give bond to pay withdrawal taxes upon the foreign beer sold in Indiana in the same amount as the withdrawal taxes paid by the Indiana brewer upon domestic beer sold in that State. The wholesaler without a Port of Entry permit may within his territory consisting of the county of his residence and adjoining counties sell domestic beer, and foreign beer only when purchased from a wholesaler with a Port of Entry permit.

The Indiana Act also provides that no alcoholic beverage shall be imported or transported into the State unless the same is at the time of the importation or transportation the absolute property of a permittee authorized to import.

Pertinent portions of the Indiana Alcoholic Beverages Act are hereafter set forth in Exhibit B.

This Act was pleaded by reference in the appellant's bill of complaint. However, as the legislation adopted by the Michigan Liquor Control Commission did not specify in what particulars the laws of Indiana required the designation of Indiana as a State having discriminatory legislation presumptively insisting upon each of the specifications of amended Section 40 as requiring the exclusion of Indiana beer, it is necessary also to analyze the third and fourth standards set up in the Michigan Act.

The third standard of exclusion appertains to beers from States;

> "which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein;"

This standard in effect declares that if a State has what might be called the "master importer system", that is, the channelizing of beer importations in such a manner as to require responsibility for tax or the handling of such importations only by persons thus licensed regardless of whether they actually acquire property in the beer or not, the beer produced in such states can not be shipped into Michigan. Plainly, the Michigan Legislature, believing that the sale of Michigan beer in other States may be thereby augmented, has sought to constrain its sister States to forego forbidding within their territory any simplifying channelization of the importation which such sister States might consider well designed to police the stream of imported beer.

Clearly, how or through what channels imported beer may move into the State of Indiana has no bearing upon the policing of the domestic traffic in alcoholic beverages within the State of Michigan.

The fourth and last standard of exclusion under the Michigan Act forbids the importation into that state of beer produced in States;

> "which impose any higher taxes or inspection fees upon beer manufactured in this state when transported into or sold therein, than is imposed upon beer manufactured and sold within said state."

This operates to exclude from the State of Michigan beer produced in any State which seeks to impose a higher tax or inspection fee upon foreign beer than it imposes upon its own. Thus the differentiation in the treatment of foreign beer as compared with domestic beer by way of higher tax or inspection fee must be abandoned by any State if the economic pressure resulting from excluding its beer on account of the presence on its statute books of the obnoxious statutory provisions is to be avoided.

Appellant insists that each of the statutory provisions of the sister States of Michigan which under the Michigan Act requires the exclusion of beer produced in a State having any such provisions, are clearly within the dispensation accorded to the States under the Second Section of the Twenty-first Amendment as construed in *State Board of Equalization* v. *Youngs Market Co.*, 299 U. S. 59, 64.

Upon the face of the Michigan Act it will be seen that the criteria for exclusion have no relation to policing the domestic alcoholic traffic within the State of Michigan nor to the quantity or quality of beer being imported into the State. On the contrary the whole trend of the Act is to seek to liberalize the laws of the sister States of Michigan by means of economic pressure so that the flow of Michigan beer into such States may be thereby augmented.

Let us now compare the Michigan Act with the laws upheld in the *Youngs Market* and *Joseph Triner* cases. In the enactment of these laws the Legislatures of California

and Minnesota determined that for the benefit of their respective citizenries certain regulations were necessary. These regulations were accordingly adopted without regard to the laws of any other State and were absolute and unconditional in their application. The Michigan Act is essentially different for the Legislature of Michigan did not determine that the importation of beer from Indiana or any other State was detrimental to its people and therefore should absolutely and unconditionally be prohibited. The Legislature of Michigan merely determined that such importations should be prohibited only if Indiana maintained certain statutory provisions for the regulation of the liquor traffic within its own borders. It seems obvious that the determination of whether the importation of Indiana beer into Michigan is beneficial or detrimental to its people can not be conditioned upon what may be the domestic laws of Indiana, for if the exclusion of Indiana beer promotes the welfare of the people of Michigan, such would be the case regardless of what kind of local laws Indiana might at the moment have in force.

The Court's Finding of Facts Showing the Purpose of the Michigan Act.

The factual situation as disclosed in the court's finding of facts reveal that the challenged Act is wholly unadapted and actually unrelated to controlling the total volume of beer flowing into the State of Michigan to the extent that the infirmity of the Act in this respect is not a mere lack of meticulous adjustment but results from the real design of this legislation, namely, the promotion of the exportation of Michigan beer.

In the court's finding of fact appears the following taken from Clause H of the appellant's bill of complaint as amended.

"In the ten states designated by the said State Liquor Control Commission in their said regulation of December 14, 1937, the number of licensed breweries and the amount of beer by them produced during the fiscal year ending June 30, 1937, are now set out in the following table, to-wit:

State.	Number of Breweries.	Barrels.
Indiana	17	2,254,490
Maryland	12	1,338,893
Nevada	2	21,388
New Hampshire	1	58,824
North Carolina	1	82,293
Pennsylvania	109	6,614,907
Tennessee	3	155,952
Washington	17	915,391
Vermont	0	0

That in the fiscal year ending June 30, 1937, beer was produced in respective states named below by the number of breweries and in the amounts now set out;

State.	Number of Breweries.	Barrels.
Illinois	62	4,059,423
Kentucky	7	986,039
Missouri	20	3,442,809
New York	69	9,230,725
Ohio	55	4,281,448
Wisconsin	86	6,448,420

That during the first nine calendar months in the calendar year 1937 there were in all 603,241 barrels of beer produced outside of and imported into the State of Michigan. During the first ten calendar months in the calendar year 1937 there were imported into the State of Michigan 145,250 barrels of beer produced in the State of Indiana. That substantially all of said 603,241 barrels of said beer imported into the State of Michigan during the said nine months excepting the portion imported from the State of Indiana, were produced and shipped from the States of Illinois, Missouri, Ohio

and Wisconsin and substantially no part of said beer produced outside of the State of Michigan and imported into the State of Michigan for sale therein during the said period of nine months were produced or shipped from the states of Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee, and Washington and none whatsoever from the State of Vermont. And that during the same period the amount of beer imported into the State of Michigan which was produced in other states of the Union than Michigan amounted to bout twenty per cent of the total amount of beer consumed in the State of Michigan. That in the four states of Illinois, Missouri, Ohio and Wisconsin, which, as above alleged, produced and imported into the State of Michigan in excess of two-thirds of the total amount of beer imported into the State of Michigan during said period, are located the number of breweries as above set out which are capable of producing and importing into the State of Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan.

"That in the said regulation adopted by said Liquor Control Commission of the State of Michigan on December 14, 1937, the states of Illinois, Missouri, Ohio and Wisconsin are not designated as states having laws containing the provisions which require under said legislation of the State of Michigan the exclusion of beer produced therein.

"That in fact the laws of the states which are not designated in the said regulation of the Liquor Control Commission of the State of Michigan do not contain provisions requiring the exclusion of beer produced therein under the said legislation of the State of Michigan.

"That in truth and fact the type of liquor control statute described in said amended Section 40 herein complained of has no bearing or relation to the amount of beer produced in any of the said states and shipped

into the State of Michigan and the fact whether or not laws of any of said states contain provisions which require or do not require the exclusion of beer produced therein under said Section 40 has no bearing upon or relation to the amount of beer produced therein and shipped into the State of Michigan and the said standards prescribed in said statute of the State of Michigan for the admission or exclusion of beer produced in other states according to the provisions of the laws of other states have no bearing or relation in fact to the amount of beer made in any state and shipped therefrom into the State of Michigan or any bearing or relation to the control of liquor traffic in the State of Michigan."

From the findings of fact it is clear that the Act was not directed at the States shipping the major portion of beer into Michigan, namely, Missouri, Illinois, Wisconsin and Ohio, although these States have also the plant facilities to increase the volume of their beer imported into Michigan so as to take up any slack caused by the displacement of the smaller volume from States which fall within the doom of the Act.

Besides, it can be easily observed that if the Michigan Act accomplished its real purpose, namely, to secure the repeal of obnoxious provisions now contained in the laws of other States, the beer from such other States would flow without interruption into Michigan and the total volume of beer being imported into Michigan would not be reduced by a single barrel.

This view of the purpose of the Michigan Act is confirmed by the propaganda put forward in support of the retaliatory type of legislation. We quote from an article in Brewery Age (Feb. Number, 1938, p. 8):

"States which have discriminatory laws then will have but two alternatives; either to remove all discriminations or to have highly important outstate

> markets closed to them. They will, we are confident, take the former course, with the net result that ultimately beer will enjoy the same freedom in interstate commerce afforded to all other legitimate articles of commerce, a status that is to be highly desired for the good of the brewing industry as a whole."

It is well to bear in mind that the "discriminatory" laws referred to in this article are laws similar to the laws of California and Minnesota which have been upheld in the *Youngs Market* and *Joseph Triner* cases. That such is the purpose of the Michigan Act is at least reflected in the opinion of the trial court below when it declares that, "* * * It is not an unreasonable classification to discriminate against out State products in respect to their source when the laws of the State or origin create the evils sought to be remedied * * *", while this purpose is boldly proclaimed by the decision of the three-judge court in the Western District of Missouri, *Joseph S. Finch & Co. et al.* v. *McKittrick et al.*, 23 Fed. Supp. 244, 248, No. 252, now pending on the present term docket of this Court. The language of the trial court in the latter case runs;

> "Who will deny that at least it can be argued with a show of reason that the Missouri statute will tend to induce Indiana, and Pennsylvania and Massachusetts and Michigan to remove the barrier they have put up to shut out the products of the Missouri brewers and distillers (as well as like products from other states)?"

What both these courts have overlooked is the simple truth that if such be the object of the Michigan and Missouri statutes there can be no doubt in respect to the disintegrating effect of this legislation upon the integrity of the Twenty-first Amendment itself and that only an application of the Commerce Clause and the Fourteenth Amendment can prevent the subversion of the Second Section of the Twenty-first Amendment.

The Michigan Act is Subversive of the Second Section of the Twenty-first Amendment.

Both the immediate object and the ulterior thrusts of the Michigan Act reach into a sister State for the purpose of coercing the legislature of that State through economic retaliation to liberalize its provisions governing the admission of beer from the State of Michigan with the anticipated result that the sale of the Michigan beer therein would be augmented.

Since the passage of this legislation no sister State of Michigan can "Lift its hand freely in the sunshine as before, without the sense of that which it forebore", namely, freedom to prescribe its own domestic policy in respect to the local alcoholic traffic solely from the standpoint of its police necessities, unhampered by fear of reprisal or retaliation against the export of its breweries. Since the passage of this Act a State may not enjoy the dispensation accorded to it under the Twenty-first Amendment to enact any suitable system of differentiating for police purposes in the treatment of the streams of local and foreign beer without incurring the loss to its alcoholic industries of foreign markets, for the very reason that such State has taken advantage of the provisions of the Twenty-first Amendment.

The situation is analogous to that produced by legislation heretofore denounced by this Court which required of a foreign corporation as a condition precedent to its admission to do intrastate business that such corporation forego resort to the Federal courts. Undeniably legislation of the type represented by the Michigan and Missouri laws renders it more difficult and embarrassing for a State to avail itself of the dispensation accorded it by the Twenty-first Amendment. If such be the case the exercise of the

legislative functions which have become permissible under the Second Section of the Twenty-first Amendment will be more and more abandoned and to that extent the beneficent object of the Amendment will be defeated.

Can the Twenty-first Amendment be Construed to Sustain Statutes Which Tend to Defeat Its Purpose.

Precedents abound which declare the principles which control the decision of this question. In *Prigg* v. *Pennsylvania*, 41 U. S. (16 Pet.) 345, 395, 10 L. Ed. 1060, 1089, Mr. Justice Story speaking for the court said:

> "No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction equally accordant with the words and sense thereof, will enforce and protect them."

In *Jarrolt* v. *Moberly*, 103 U. S. 580, it is said:

> "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed."

In *Laderburg* v. *Miller* (C. C. A. 4), 210 Fed. 614, 616, the court said:

> "The principle is elementary that a construction which would result in making a legislative enactment self-destructive or of no practical value will be rejected when there is a reasonable construction which would result in carrying out the manifest design of the statute; and, in applying this rule, that which is necessarily implied, as well as that which is expressed, must be regarded a part of the enactment. * * * Under this rule the Constitution of Virginia cannot be construed to contemplate the annulment of one of its own provisions by allowing a failing debtor to trans-

mute a shifting stock of merchandise not exempt into exempt property by withdrawing it from sale for the purpose of claiming it as an exemption."

In re Dowling, 219 N. Y. 44, 113 N. E. 545, 548, the Court of Appeals, with Mr. Justice Cardozo concurring, declared:

"In the construction of a statutory or constitutional provision a meaning should not be given to words that will defeat the purpose and intent of the statutory provision or that will make such provision absurd."

The familiar rule is declared in *United States* v. *Freeman*, 3 How. 556, 11 L. Ed. 724:

"A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."

A law though formally enacted which must rest for its validity on the Second Section of the Twenty-first Amendment can not be deemed to fall within the category of "laws" referred to in the Amendment, if the purpose and effect of law is to bring the Amendment into disrepute and disregard. To countenance such a statute is in effect to hold that the Amendment contains within itself the seeds of its own destruction and that in fact it was written in the contemplation of and even to facilitate its own annulment.

Moreover, the situation involved in this appeal, although somewhat unique, is not wholly without analogy as intimated above to statutes requiring that a foreign corporation forego a Federal right, such as resort to a Federal court, as a condition precedent to domestication.

Originally it was held *Paul* v. *Virginia*, 8 Wall, 168, 181, that a State having power to exclude foreign corporations from its limits may admit them upon such terms and con-

ditions as the State may think proper to impose. Later in *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 456, the sweeping language in *Paul* v. *Virginia* was limited to the particular facts of that case and it was held that this language could not be extended to include conditions repugnant to the Constitution and laws of the United States. Subsequently, in *Southern P. Co.* v. *Denton*, 146 U. S. 202, 207, a Texas statute requiring a foreign corporation desiring to be domesticated in that State to agree that it would not remove any suit from a court of the State into the Federal court, was held unconstitutional and it was there declared:

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

This doctrine was for a while repudiated by the Supreme Court of the United States, *Security Mut. L. Ins. Co.* v. *Prewitt*, purporting to follow the case of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535.

However *Terral* v. *Burke Constr. Co.*, 257 U. S. 529, 533, overruled the *Prewitt* and *Doyle* cases and approved the minority views of Mr. Justice Bradley enunciated in the *Doyle* case, pp. 543, 544, where Justice Bradley said:

> "Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister states; but prohibition except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mis-

chievous, and productive of hostility and disloyalty to the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other. • • •

"The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the state and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

In *Frost* v. *Railroad Commission*, 271 U. S. 583, 594, 595, 596, 597, 598, 599, the minority views expressed in the *Doyle* case were followed in an opinion reviewing the whole subject, where it is remarked (p. 598):

"And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting the privilege, is broader than the application thus far made of it."

and again at p. 599:

"The states can not use their most characteristic powers to reach unconstitutional results."

The Classification of the Michigan Act is Not the Classification "Recognized" by the Second Section of the Twenty-first Amendment.

There are three reasons supporting the view that the classification of beer (with the resulting classification of manufacturers and wholesalers of beer) hinging upon the fact that another State has enacted laws making use of the dispensation accorded by the Twenty-first Amendment cannot be a classification "recognized" by the Amendment. The first of these grounds relates to the point that we have just been discussing, namely, that the purpose and effect of the Michigan Act operates as a nullification through economic reprisal of the Second Section of the Twenty-first

Amendment. If indeed a classification resting on the circumstance that a State had taken advantage of the Amendment is a classification recognized thereby, then the Amendment must have been written in contemplation of and in order to facilitate its own destruction. This is unthinkable.

A second ground is obvious in that the classification of the Michigan Act is not factually the classification of the California or Minnesota statutes held in the *Youngs Market* and *Joseph Triner* cases to be classifications "recognized" by the Amendment. The California classification embraced all wholesalers of beer importing beer as one class, and all wholesalers handling domestic beer as another class, while the Minnesota statute created a classification consisting of all liquor processed within the State in contrast to all liquor processed without the State. The Michigan Act creates a classification consisting of manufacturers or wholesalers of domestic beer and wholesalers of foreign beer made in States whose laws do not offend the Michigan standards and the wholesalers of foreign beer originating in States the laws of which are obnoxious to Michigan standards. Lastly, there is the further ground that in the light of the history of congressional and constitutional regulations by the Nation of interstate traffic in alcoholic beverages no purpose has ever been disclosed therein to promote or foster out State sales of beer.

For these reasons the classification made by the Michigan Act does not coincide with any classification automatically made by the Twenty-first Amendment itself.

Legislation of the Retaliatory Type Falls Within the Scope of the Commerce Clause and the Fourteenth Amendment.

It seems upon principle that if the Michigan Act is subversive of the Second Clause of the Twenty-first Amendment or if the classification created by the Act is not a classification "recognized" by the Amendment or is in con-

flict therewith, then the Amendment can not be held to render the legislation immune from operation of the Commerce Clause and the Fourteenth Amendment. This follows because otherwise, as in the instant case, the Second Clause of the Twenty-first Amendment would become a sword to strike down domestic legislation of the several States made possible by the Twenty-first Amendment and would no longer operate as a shield to protect such legislation.

The laws considered in the *Youngs Market* and *Joseph Triner* cases were not laws designed to hamper resort to the Twenty-first Amendment but were laws the reasonableness or unreasonableness of which and the application of which to interstate commerce automatically resulted from the very nature of the provisions of the Second Section of the Twenty-first Amendment. But this new species of classification of the retaliatory type being clearly not within the intent of the classification made in the Twenty-first Amendment must run the gauntlet of both the commerce clause and the Fourteenth Amendment. There is not contained in the Twenty-first Amendment any express repeal of either the commerce clause or the Fourteenth Amendment. It follows that we have here the usual problem of determining to what extent a subsequent constitutional amendment has altered or modified pre-existing provisions. The controlling principles have long since been well settled. Mr. Justice Butler, speaking for a majority of the court in *U. S.* v. *Lefkowitz*, 285 U. S. 452, 467, said:

> "And this Court has always construed the provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions."

Said Mr. Justice Holmes in the majority opinion in *Gompers* v. *United States*, 233 U. S. 604, 609:

> "But the provisions of the constitution are not mathematical formulas having their essence in form, they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words in a dictionary, but by considering their origin and the line of their growth."

Again in *Baine Peanut Co.* v. *Pinson*, 282 U. S. 499, 501:

> "The interpretation of constitutional principles must not be too literal."

In *Eisner* v. *Macomber* (1919), 252 U. S. 189, 205, 206, this Court had occasion to construe the Sixteenth Amendment of the Constitution authorizing a Federal income tax from the standpoint of the taxability of a stock dividend; and in that connection to consider the bearing upon the new amendment of certain pre-existing provisions in the Constitution requiring apportionment according to population for direct taxes upon real or personal property. The court there said:

> "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property real and personal."

The more recent case of *Evans* v. *Gore* (1920), 253 U. S. 245, 259, is a clear instance of the discriminating construction applied by this Court to the new amendment from the standpoint of its relation to pre-existing provisions of the Constitution, and Mr. Justice Van Devanter, speaking for the Court, said:

> "Preliminarily we observe that, unless there be some real conflict between the Sixteenth Amendment and the

prohibition in Article III, Sec. 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed."

In *Marbury* v. *Madison*, 1 Cranch. 137 (2 Law Ed. 60), this Court declared:

"A construction which raises a conflict between parts of the constitution is inadmissible when by any reasonable interpretation they may be made to harmonize."

In *Popovici* v. *Agler*, 280 U. S. 379, 383, 384, the broad language of Article III Section 4 of the Federal Constitution:

"The Judicial Power shall extend * * * to all Cases affecting Ambassadors, other public Ministers and Consuls,"

and further providing:

"In all Cases affecting Ambassadors, other public Ministers and Consuls * * * the Supreme Court shall have original jurisdiction,"

was construed so as not to include a divorce proceeding against a foreign consul. In speaking for the court Mr. Justice Holmes in this case observed:

"The language, so far as it affects the present case, is pretty sweeping, but, like all language, it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."

and further:

"If when the Constitution was adopted the common understanding was that the domestic relations of hus-

band and wife and parent and child were matters reserved to the states, there is no difficulty in construing the instrument accordingly, and not much in dealing with the statutes."

Literally the language of the Twenty-first Amendment is not more comprehensive than the language of the Sixteenth Amendment or the language of Article II Section 3 of the Constitution, the one referring to "income from whatever sources derived" and the other referring to "all suits."

In *Fiske* v. *State of Missouri* (1933), 62 F. (2d) 150, 154 (C. C. A. 8th), the Court said:

> "The Amendment does not stand alone, and no construction of its meaning based upon such hypothesis can be sound. It is only a part of the Constitution, and must be construed as such. Like all instruments, the Constitution is subject to the rational rule of construction that the parts must be understood in relation to each other and to the entirety in order to preserve the fullest vitality of the whole instrument in all of its parts. 'It cannot be presumed that any clause in the Constitution is intended to be without effect * * * unless the words require it.' Marbury *v.* Madison, 1 Cranch 137, 174, 2 L. ed. 60; Prout *v.* Starr, 188 U. S. 537, 543, 23 S. Ct. 398, 47 L. Ed. 584. Therefore, when some particular clause, in its bare wording, seems to destroy or limit or qualify some other clause, it is the office of the Court to examine the involved parts in the light of the entire instrument with a view to preserving such extent of each as can harmoniously live together. Such rule has been applied to this Amendment."

In re opinion of the Justices (Mass. 1933), 197 N. E. 99, the court said:

> "Articles 48 and 64 of the Amendments are equally parts of the Constitution. They stand on the same footing. They are to be construed and interpreted in combination with each other and all other parts of the Con-

stitution as forming a single harmonious instrument for the government of the Commonwealth. Tax Commissioner *v.* Putnam, 227 Mass. 522, 524, 116 N. E. 904, L. R. A. 1917F, 806; Opinion of the Justices (Mass.), 196 N. E. 260."

The Constitutional provision against diminishing the salaries or emoluments of judges during their term, while of immeasurable importance to the stability of our form of government, is not paramount to the provisions of the Fourteenth Amendment safeguarding against State action the life, liberty and property of individuals through insistence upon due process of law and equal protection of the law; or to the provisions of the commerce clause in so far as they apply to instances where States have sought through reprisal or retaliation industrial self-aggrandizement at the expense of their sister States wholly apart from regulations of a police character.

Indeed it is hard to see in what respect the power of the State over interstate commerce in intoxicating beverages, except where the Twenty-first Amendment has expressly or by inevitable implication otherwise provided, can be exempt from the provisions of the Fourteenth Amendment when the power of Congress itself over interstate commerce generally is subject to the limits of the Fifth Amendment as declared in *United States* v. *Chicago, M. & St. P. Railway Co.*, 282 U. S. 311, 327 and cases there cited and in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, 347. Of course, so far as the State law falls within the classification made by the Twenty-first Amendment or is not subversive of that Amendment, the commerce clause yields to the Amendment. However, the extent of the dispensation from the provisions of the Commerce Clause is delimited by the necessity which may remain for employing the commerce clause to prevent the frustration of the Second Section of the Twenty-first Amendment. At the time of the adoption

of the latter Amendment there was no desire on the part of the people of the United States to abate the rigors of the commerce clause inhibiting the erection of economic barriers between States and there was no disposition on the part of the framers of the Amendment to disturb the harmonious relationship of the States which had been fostered by the provisions of the commerce clause as construed by the Supreme Court of the United States. In the debates in Congress over the adoption of the Amendment and in the discussions in the several State conventions ratifying the Amendment there appears no hint of dissatisfaction with the provisions of the commerce clause insofar as this clause operated to prevent trade wars or reprisal between State and State. It was not in an atmosphere of discontent with this aspect of the commerce clause that the Twenty-first Amendment was written. Likewise, it is certain that there was no intention on the part of the people of the United States to dispense with provisions of the commerce clause or of the Fourteenth Amendment in so far as such provisions would be required to render effective the Second Section of the Twenty-first Amendment. In other words it is scarcely tenable to maintain that the historic purpose of the commerce clause to prevent trade wars between the States and thus to promote an harmonious union or the fundamental provisions of the Fourteenth Amendment requiring statutes to have discernible public objects, reasonable classification and reasonable relation to their purposes have been abandoned in respect to purely economic aspects of the liquor industry, when so to hold would convert the Second Section of the Twenty-first Amendment into an engine of self destruction.

This type of legislation which seeks to wreck local laws of the police type producing only incidental discrimination, has oddly enough been dubbed an "anti-discrimination" measure. Most of these retaliatory measures promoted in concert have appeared in a stereotyped form, the so-called

"anti-discrimination" bill, introduced in 1937 in the Legislatures of California (Ass. Bill 2794); Connecticut (S. B. 667); Illinois (S. B. 221); Iowa (S. B. 267); Nebraska (S. B. 315); and Missouri (House Bill 331); but enacted only in the standardized form in Missouri and in a modified form in Michigan (amended Section 40 herein challenged), the pertinent portions of the Missouri Act being set out in Exhibit C of this brief.

The Missouri Act prescribes eight separate standards of exclusion, each based upon a specifically described provision, which, if included in the law of a sister State, necessarily effects the exclusion of both beer or whiskey originating in that State, and adds a ninth general standard of exclusion which outlaws the beer or liquor produced in any State if the laws of that State contain any "prohibitions, restrictions or conditions" which would place the alcoholic liquor manufactured in Missouri "at a disadvantage in competition with the same kind of alcoholic liquor manufactured in such State." The challenged Michigan Act embraces but four of the standards of the Missouri Act and was evidently derived therefrom. Pennsylvania, following the passage of the Missouri and Michigan Acts, enacted a statute imposing the same restrictions and prohibitions on beer from a foreign State that such State imposes on beer from Pennsylvania (Pa. Law 1937, No. 372, Section 29, passed June 16, 1937).

Alabama enacted an anti-discrimination statute in general terms without any specific definitions of discrimination (Alabama General Acts, Extra Session 1937, No. 66, Section 63). (Also see a general discussion of the nature and purpose of these Acts and of the constitutional aspects thereof in Columbia Law Review Magazine, Vol. XXXVIII, No. 4, 1938, pp. 644, 669).

Ostensibly all these Acts were enacted to protect the "home market" but actually these Acts are legislation in

disguise enacted for the sole purpose of bringing economic pressure upon the legislatures of sister States to constrain them to abandon the purely police type of legislation so as to permit out-of-State beer to move into their borders without being thus hampered. The propaganda which has been put forward in support of this so-called anti-discrimination bill is quite outspoken as appears in the article in Brewery Age (Feb. Number, 1938, p. 8) quoted above.

Thus it will be seen that the conscious and proclaimed purpose of this retaliatory legislation is to emasculate the Second Section of the Twenty-first Amendment and enable beer to flow freely in the channels of interstate commerce in spite of its provisions. This type of legislation makes use of trade wars and reprisals forbidden by the Commerce Clause in order effectually to annul the Twenty-first Amendment on the theory that the Twenty-first Amendment has done away with every species of restraint even against purely economic warfare contained in the Commerce Clause or the Fourteenth Amendment.

Neither the court in its opinion in this cause below, 21 Fed. Supp. 2969, nor the three-judge court in the Western District of Missouri, No. 130, disclaims the progress of this purely economic warfare. Indeed, these opinions acknowledge that this state of trade warfare now exists. This acknowledgment is premised in the opinion of the three-judge court in the present appeal and is fully acknowledged in the opinion of the Missouri three-judge court where it is declared:

> "The Missouri statute discriminates against Indiana manufacturers in favor of those in Georgia because Indiana discriminates against Missouri manufacturers and Georgia does not. The discrimination is certainly bottomed on reason, not a price. It is bottomed on the same reason as supports those national laws which effectuate the raising and lowering of our tariffs against goods imported from foreign countries as they raise

and lower their tariffs against American manufactured goods."

Of course, we cannot fully foresee to what length this economic warfare is likely to proceed if the Second Section of the Twenty-First Amendment permits a State to annex as a condition precedent to the importation of liquor into its boundaries any terms it pleases no matter to what extent such terms require that constitutional rights be abandoned and the harmony that prevails among the States disturbed. We can, however, cite a likely instance of what will occur. The four States of Kentucky, Pennsylvania, Illinois and Indiana in the fiscal year of 1937 produced 86 per cent of all the whiskey manufactured in the United States according to the United States Treasury Department statistics on distilled spirits, p. 7 (fiscal year 1937). This industry, therefore, substantially allocated to these four States only, is completely at the mercy of their sister States, not as regards the exclusion of their liquors for police purposes, but as regards economic constraint in other respects. Any State is free under the theory of the "anti-discrimination" acts to say that liquor may not be shipped into its borders from any State unless the government of that State purchases all of its road and other public materials and supplies from the enacting State. Thus Missouri can say to Michigan or Pennsylvania, "You may ship no liquor into this state unless preference is given to the products of Michigan manufacturers, building materials or other supplies purchased by you as a state."

It is our contention that this chaotic condition results from a perversion of the purpose of the Second Section of the Twenty-first Amendment and that in order to prevent the obvious disastrous consequences ensuing therefrom that a line of demarcation should be drawn with respect to reconciling the commerce clause and the Fourteenth Amendment

with the Twenty-first Amendment so as to preserve a proper scope for the commerce clause and the Fourteenth Amendment, where needed to sustain and reinforce the Twenty-first Amendment, and even, as we shall presently see, to maintain the primary purposes of the Constitution as a whole.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 596, the opinion of the court, speaking of the Commerce Clause, runs:

> "The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation, —one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it. Even their power to lay and collect taxes, comprehensive and necessary as that power is, cannot be extended in a way which involves a discrimination against such commerce."

Likewise in this connection the following language of this Court becomes pertinent:

> "To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."
>
> *Coyle* v. *Smith* (1911), 221 U. S. 559, 567, 580 (55 L. Ed. 853, 858, 863).

In *Wisconsin* v. *Michigan* (1935), 295 U. S. 455, 461, 462, this Court in a boundary dispute where the boundary ran through a channel declared:

> "The doctrine of the thalweg is a modification of the more ancient principle which required equal division of territory and was adopted in order to preserve to

each State equality of right in the beneficial uses of the boundary streams as a means of navigation. Minnesota *v.* Wisconsin, 252 U. S. 273, 282, 64 L. Ed. 558, 564, 40 S. Ct. 313."

"* * * The rule that the States stand on an equal level or plane under our constitutional system (Wyoming *v.* Colorado, 259 U. S. 419, 465, 470, 66 L. Ed. 999, 1013, 1015, 42 S. Ct. 552) makes in favor of that construction of the boundary provisions under consideration. Ct. Connecticut *v.* Massachusetts, 282 U. S. 660, 670, 75 L. Ed. 602, 607, 51 S. Ct. 286."

Certainly it can not be argued that it is the intent of the Twenty-first Amendment to encroach upon the objects of the Constitution itself as numerated in its preamble, "* * * to form a more perfect Union, * * * insure domestic tranquillity, * * * promote the general welfare * * *". Certainly the American people have not abated their devotion to these original purposes. The preamble of the Constitution itself seems to impel the reconciliation of the Amendment with the original provisions of the Constitution and to preserve the functions of the commerce clause and the Fourteenth Amendment so far as is requisite to enable the purposes described in the preamble of the Constitution to be effected.

In *Baldwin* v. *Seelig,* 292 U. S. 511, 522, 523, the late Mr. Justice Cardozo, speaking for the Court, very happily declared:

"The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

This remark followed a discussion by the Court of the same type of arguments that have been invoked in the minds of

the trial courts below dealing with the Michigan and Missouri Acts and predicating a remote connection with the police power upon deductions based upon advancing the prosperity of a State at the expense of its neighbors. In this same opinion the court covered the history of commercial rivalries between the States, their unfortunate results, and also indicated the line of demarcation which may be applied in order on the one hand to protect the police functions of a State free of outside interference under the terms of the Second Section of the Twenty-first Amendment and on the other hand to prevent that Amendment from degenerating into a mere weapon of offense in the conduct of trade wars between the States. We quote further from this opinion:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the Commerce Clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III pp. 478, 547, 548; the Federalist, No. XLII; Curtis, History of the Constitution, vol. 1 p. 502; Story on the Constitution, Sec. 259. If New York in order to promote the economic welfare of her farmers may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.
>
> "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the

maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. Nebbia *v.* New York, 291 U. S. 5032, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, *supra.* Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity, * * *".

It will be noted that the line of demarcation follows the determination of the primary purpose of the legislation. If the primary purpose of the legislation is to visit sister States with reprisal and retaliation in order to constrain a change in their laws and promote the export of intoxicating beverages, plainly such legislation transcends the dispensation accorded to the States from the commerce clause and the Fourteenth Amendment. If, on the other hand, the primary purpose of the legislation is a regulation of the domestic traffic and protection against the local policy of the State through interference from beyond its borders, such legislation falls within the dispensation of the Amendment even though there be incidental discrimination against the alcoholic products of other States or even

though the alcoholic products of other States be entirely barred.

The Fourteenth Amendment is also applicable for the protection of the business and property of the appellant, if the classification turning entirely on the provisions of the laws of other States, is not a classification, as pointed out above, which is recognized by the Twenty-first Amendment or if the classification can be deemed as being based upon the fact that a given State is availing itself of the dispensation of the Amendment, because such latter classification would logically be based upon the nullification of the Amendment. A State law making such classifications would be repugnant to both the equal and due process clauses, because the classification would have no substantial relationship to the accomplishment of a legitimate end.

If the view be sound that the challenged Act has a subversive effect upon the integrity of the Twenty-first Amendment itself, can such an Act have a discernible public object? Is it conceivable that there can be a public welfare of the people of Michigan in conflict with the public welfare of the people of the United States? Can it advance the public welfare of the Nation if a State enact legislation which professedly is intended to bring a Federal constitutional amendment into "innocous desuetude"? Can a State constitutionally reward one who violates the law of a sister State or a law of the United States? Instantly such a contention would be met with the principle that such a law would be without a discernible public object. It must be remembered that the Twenty-first Amendment is a Federal constitutional amendment. This circumstance brings the case plainly within the principles laid down by Mr. Justice Bradley quoted above and especially within his observation, "The States cannot use their most characteristic powers to reach unconstitutional results," and his

further observation, "The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and general government, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

In *Panhandle Eastern Pipe Line Co.* v. *State Highway Commissioners*, 294 U. S. 613, 622, referring to the police power of a State, it is said:

> "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

In *Treigle* v. *Acme Homestead Assoc.* (1936), 297 U. S. 189, 196, Mr. Justice Roberts, speaking for the Court, said:

> "Such an interference with the right of contract can not be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended. The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association lawful when made. This cannot be done under the guise of amending the charter powers of the corporation. Compare Bedford *v.* Eastern Bldg. & L. Asso., 181 U. S. 227, 45 L. Ed. 834, 21 S. Ct. 597."

and again, in the same case:

> "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights can not inhibit the proper exertion of the power, it must be exercised for an end which is in fact public,

and the means adopted must be reasonable adapted to the accomplishment of that end and must not be arbitrary or oppressive."

Jay Burns Baking Co. v. *Brien*, 264 U. S. 504;
Weaver v. *Palmer Bros. Co.*, 27 U. S. 402.

If the objects of the Michigan statute are those which we have described or if it has a subversive effect upon the Amendment involved, the police power of that state has been exercised for an end which is in fact not public and the act falls, under the cases cited above in this argument and in the summary of argument, within the prohibitions of the Fourteenth Amendment.

Of course, the plaintiff, a corporation duly licensed to sell intoxicating liquors in the course of interstate commerce by the State of Michigan, is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment and can not be subjected to the State statutes in conflict with the Federal Constitution.

Liggett Co. v. *Baldridge*, 278 U. S. 105, 111.

We have noted in the summary above cases sustaining the proposition that the appellant can assert its damage through the violation of the constitutional rights of its customers and thus successfully assail the challenged law; and further that it was not necessary for the appellant to resort to any administrative proceedings provided by the laws of Michigan or to the relief afforded by the State courts since the contention of the appellant is based on the absolute nullity of the Michigan statute.

Opinions of the Trial Courts Passing on the Michigan and Missouri Acts.

Although in addition to general and specific statements charging the violation of the commerce clause and the Fourteenth Amendment by the challenged Michigan Act, the

appellant, in clause G of the amended bill, asserted that the challenged Act exceeded any permission to that State accorded by the Second Section of the Twenty-first Amendment, the three-judge court in the present appeal paid scant heed to the commerce clause, erroneously assuming that the *Youngs Market* case had disposed of the appellant's contention in respect thereto, and wholly ignored the contentions of the appellant with reference to the Second Section of the Twenty-first Amendment with the mantle of its protection over the retaliatory type of legislation. Likewise, although in Clause G (4) of the bill it was asserted that the Michigan Act was retaliatory, extra-territorial in its operation and effect, and intended to constrain and hamper the States of the Union in the enactment and enforcement of laws relating to their domestic policy contrary to the constitutional relationship of the States and the new Amendment, these contentions were entirely ignored in the opinion of the court below. The court however did logically base its opinion upon the premise that the economic pressure exerted by the Michigan Act was within the dispensation of the Twenty-first Amendment because the court declared that Michigan had,

> "Power to regulate its own industry and control its own market to the extent that its industries were elsewhere excluded and to the extent that such exclusion threatens their economic stability",
>
> * * * "to discriminate against out state products in respect to their source when the laws of the state of origin create the evils to be remedied. * * *".

These expressions of the court's opinion disclose its rational. It clearly holds that the law of a sister State legitimate under the Twenty-first Amendment can yet be regarded as creating an evil which Michigan may cure by conditioning the admission of the beer produced in such

State into Michigan upon the contingency that such state repeal its laws. Clearly the underlying premise in such reasoning is that a State has been supplied with a weapon of offense, an instrumentality of retaliation, designed to constrain a sister State to undo what it has done by virtue of the Twenty-first Amendment. This opinion proceeds on the further premise that what is done by a State legitimately by virtue of the Twenty-first Amendment may yet produce what a sister State may substantially declare an evil susceptible of correction by the exertion of the police power of the latter State to erect an economic barrier so as to compel its sister State to forego availing itself of the Second Section of the Twenty-first Amendment.

What the court below overlooked was the disintegrating effect of such a holding upon the integrity of the Twenty-first Amendment itself and that the commerce clause and the Fourteenth Amendment are in such a case necessary to prevent the frustration of the new Amendment.

The court based its justification of economic pressure upon a misinterpretation and misapplication of the decision in *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412. Of course in the latter case this Court did hold it proper for the State of Louisiana in levying a chain store tax to take into consideration the number of stores the taxpaying chain had in other States as well as in Louisiana, but clearly not to exert any pressure upon the legislatures of the sister States or to affect the business of such a company conducted in other States, but only for the purpose of measuring the economic power and advantage of such company capable of being exerted in the State of Louisiana on account of its power and wealth wherever located.

The decision of the United States District Court for the Western District of Missouri in *Joseph S. Finch & Co. et al.* v. *McKittrick et al.*, 23 Fed. Supp. 244, upholding the legis-

lation of Missouri (Laws of Missouri 1937, p. 536), containing provisions similar to the Michigan Act, likewise erroneously assumes that the *Youngs Market* case disposes of any question of the application of the Commerce Clause to that relation and apparently does not concern itself with the detrimental effect of this relation upon the legitimate use of the Twenty-first Amendment itself.

The discussion of the court in Missouri case is confined to the equal protection clause of the Fourteenth Amendment, and when analyzed is found to be confined to the propriety of the classification created by the Act, which is similar in that respect to the Michigan Act. However, the court in the *Missouri* case concedes that the object of the Act is to "promote the interest of Missouri brewers and distillers engaged in an important industry." The court erroneously assumes that object is accomplished by shutting off some competition from the Missouri field, although it is plain that if the law had its desired effect, namely, to induce other States to remove those provisions from their statutes which are obnoxious to the Missouri law, no competition from other States would be cut off in any degree whatsoever. But the court lays emphasis on the fact that the real method for obtaining the advantage sought by the Missouri legislation is "by offering an inducement to other States to withdraw products of this Missouri industry. * * *" The court then attempts the deduction as it were by saying that the legislation benefits the brewer and from him the benefits go out to the people of the State at large, but expressly admits that there is discrimination against certain States to secure the economic advantage of Missouri.

Appellant insists that these decisions are not only erroneous in their conclusions and reasoning but quite beside the points herein chiefly urged and distinctly raised in the bill below.

In closing this argument we may observe in the first place that it is apparent that we have in the present appeal a case distinct from the *Youngs Market* and *Joseph Triner* cases and one which presents an entirely different problem to this Court. There was no suggestion in the *Youngs Market* and *Joseph Triner* cases of any hostility in the California and Minnesota Acts toward the spirit and operation of the Twenty-first Amendment. These acts were not conceived in a spirit of seeking to inhibit the employment of the Twenty-first Amendment by the several States. Besides, the classification made by the Michigan Act is essentially dissimilar to the classification made by the California and Minnesota Acts. Neither did these Acts seek to exert any pressure or constraint upon the legislatures of the sister States.

But in the present case it is equally apparent that there is a concerted movement in progress because the enactment of the so-called "anti-discrimination" legislation is for the avowed purpose of constraining the several States to forego resorting to the dispensation accorded them by the Twenty-first Amendment. Let it be remembered that the word "anti-discrimination" is applied to the type of legislation represented by both the Michigan and Missouri Acts and is thus professedly antagonistic to legislation recognized as constitutionally valid by the *Youngs Market* and *Joseph Triner* cases.

Can there be a more complete demonstration of the real objective sought by this legislation? And strange to say it is the allegedly unqualified dispensation from the commerce clause and the Fourteenth Amendment accorded by the Twenty-first Amendment that is invoked to secure its practical nullification.

Paradoxical as it may appear, State powers under this theory of the new Amendment have been amplified in re-

spect to the previous restraints of the commerce clause only to result in the immediate inhibition of the amplified powers of the States by the constraint which one State may under this Amendment exert upon another through economic retaliation to forego its use.

The philosophy underlying the so-called "anti-discrimination" bills professes to respect the powers of the States only for the purpose of rendering them in fact impotent and on the other hand professes an attachment for the Twenty-first Amendment only for the purpose of rendering it futile. Clearly the ideal of the Twenty-first Amendment to enable local liquor legislation to be patterned in a provincial mold is not inconsistent with the American ideal that countenances no commercial retaliation between the States. The Twenty-first Amendment is susceptible of a construction which will reconcile both the centripetal and centrifugal forces latent therein, which otherwise threatens to disrupt the harmonious relations between the States.

If the Amendment be viewed merely as an effort by constitutional Amendment to return to Chief Justice Taney's views in the *License Cases*, 5 How. (46 U. S.) 504, 586, and restore to the States the same police power over imported articles between the moment of their arrival even in original packages and the moment of their ultimate destination that a State enjoys after the latter point, certainly such police powers would be subject both to the Fourteenth Amendment and the inhibitions of the commerce clause against mere retaliation. It is not necessary, however, to sustain the views of the appellant that this view be taken by this Court, especially on account of the fact that the challenged legislation is a subtle species of assault upon the new amendment itself.

If the benign purposes of the preamble of the Constitution are still to prevail the situation is one which emphatic-

ally calls for the traditional judicial statesmanship of this Court.

Respectfully submitted,

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EXHIBIT A.

Amended Section 40 of the Michigan Act (Act No. 281, Public Acts of 1937, p. 509).

Said amended title is as follows:

"An act to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the incorporation of farmer cooperative wineries and the granting of certain rights and privileges thereto; to provide for the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referendum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances."

and said amended section 40 reads as follows:

"SEC. 40. Beer; taxation and discrimination. There shall be levied and collected by the commission on all beer manufactured and/or sold in this state a tax at the rate of one dollar and twenty-five cents per barrel if sold in bulk, and in like ratio if sold in smaller quantities, the payment of which shall be evidenced by excise tax beer stamps, caps, lids, or crowns as prescribed by the Michigan liquor control commission, affixed to the barrel, keg, case, or other container, as the case may be by the brewer if manufactured in this state, unless otherwise provided by the commission with respect to beer manufactured within this state, or by the wholesaler or the person from whom purchased if manufactured outside this state, whichever shall be designated by the commission, before sale thereof within this state by said wholesaler: Provided, however, That the tax imposed

by this act upon beer manufactured in or imported into this state shall be rebated to such manufacturer or wholesaler upon satisfactory proof being furnished to the commission by affidavit or otherwise, as the commission may determine, that such beer was shipped out of the state for sale and consumption outside the state of Michigan.

"For purposes of taxation a barrel shall be construed to contain thirty-one gallons.

"Any manufacturer duly licensed as aforesaid and who has paid said license fee shall be exempt from payment of any tax imposed under the provisions of act number one hundred of the public acts of nineteen hundred thirty-one or amendments thereto, commonly known as the malt tax act, for all malt products taxed by said act used in its manufacturing process.

"The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state."

EXHIBIT B.

(Pertinent Portions of the Indiana Alcoholic Beverages Act of 1935 With Amendments of 1937)—(Chapter 226, Acts 1935, Chapter 197, Acts 1937, Burns Revised Statutes, 1933, Supp. Sections 12-508, 12-801, 12-901.)

"SEC. 9. Beer wholesaler's permits may be issued as hereinafter provided. * * * Such wholesaler may exercise all of said permissions, both in the county of the residence of such wholesaler, and if such wholesaler be a corporation or a partnership, in the county wherein the principal office, as named in the application for such permit, is located, and may also exercise the privileges permitted under such permits in any adjoining county; Provided, however, Such wholesaler may store and keep on hand such alcoholic malt beverages only in the county of such residence and/or in the county in which such principal office is located."

"* * * Such wholesaler's permit, however, shall not be issued unless and until there be paid by said wholesaler to said administrator a separate license fee therefor of one thousand dollars ($1,000) in cash and there also be filed with the application for a permit a surety bond in the penal sum of two thousand dollars ($2,000) payable to the State of Indiana, to be approved by the commission, conditioned * * *"

"* * * After November 15, 1935, any person holding a permit to wholesale alcoholic malt beverages under this act may by complying with the terms and conditions hereinafter prescribed, apply for and may be granted by the commission, an additional permit to be known as a "port of entry permit," which shall, when granted, authorize such wholesaler so applying, to import into the State of Indiana, alcoholic malt beverages which have been manufactured outside of the State of Indiana, and to transport, possess sell and deliver, such imported alcoholic malt beverages within any county in the State of Indiana, but he may store and keep such imported malt beverages only in the county in

which he is authorized to store and keep alcoholic malt beverages under his wholesaler's permit. Such importation, transportation, possession, sale and delivery shall be subject to the rules and regulations of the commission and subject to the same restrictions provided in this act, for persons holding permits to manufacture within the State of Indiana. No holder of a wholesaler's permit shall be qualified for such said additional permit who is disqualified to hold a wholesaler's permit. No such additional permit to import alcoholic malt beverages, however, shall be issued to any wholesaler, unless and until such wholesaler shall have paid a separate additional annual license fee in the sum of Fifteen hundred dollars ($1,500) to said administrator and shall have made such a showing as the commission shall require with reference to the ownership and residence and/or ownership of the business and/or stock of such corporation, and, unless and until said wholesaler shall have filed an additional surety bond in the penal sum of ten thousand dollars ($10,000), conditioned that he will not violate any of the provisions of any law of this state, touching the alcoholic traffic or the manufacture, importation, transportation or possession or sale or delivery of alcoholic malt beverages as defined in this act and/or of the rules and regulations of the commission applicable thereto, and that he will account for and pay over all license fees levied under this act, on the products imported and sold or withdrawn for sale by him under such permit, provided that the sum of one hundred dollars ($100), and no more, may be recovered in any one action on said bond, by the State of Indiana against such wholesaler, for the violation of a rule or regulation of the commission or for the violation of any of the provisions of this act (violations prior to action instituted to be deemed one continuing violation), but the full amount of any and all said taxes and license fees due and owing may be recovered by the State of Indiana in any action on said bond. No action or actions shall be brought upon said bond, except by the State of Indiana, and for the use and benefit of the State of Indiana. A beer wholesaler's permit and/or said additional permit as a "port of entry permit" granted to such wholesaler shall continue for one (1)

year only, including the day of issue, and, thereafter, such permit or permits may be issued to the same prior holder thereof or to another applicant therefor, but only in the same manner and upon the same terms and conditions above specified and upon the payment of said special license fees. Not fewer than ten or more than one hundred port of entry permits shall be granted by the commission."

"SEC. 40. (a) Alcoholic Malt Beverage License Fees (gallonage). Any authorized manufacturer and/or importing agent, and/or wholesaler invested with the importing privileges (as to imported alcoholic malt beverages), and/or the holder of a dining car permit or of a boat permit, shall pay unto the State of Indiana a license fee of three and one-third (3⅓) cents on each gallon of alcoholic malt beverages manufactured or given or sold or withdrawn for sale or gift by him in the State of Indiana, which license fee shall be paid on the first and fifteenth day of each month, on all such beverages so manufactured or sold or given away or withdrawn for sale or gift by him during the preceding half-monthly period. * * *".

"SEC. 41. Miscellaneous Provisions. (a) No alcoholic beverage shall be imported or transported into the State of Indiana unless such beverage is at the time of importation or transportation thereof into the State of Indiana the absolute property of a permittee who is authorized under this act to import and/or transport the same into the State of Indiana, * * *"

EXHIBIT C.

Anti-discrimination Act of Missouri (Laws of Missouri, 1937).

"SECTION 1, SUBSECTION (7). The phrase "discriminatory laws" means the laws of any state, or the rules or regulations of any administrative officer, commission or body thereof, which

(a) impose any tax, impost, or license fee upon the right

to transport or import into such state any alcoholic liquor manufactured in this state; or

(b) prohibit the importation, transportation, or sale of any alcoholic liquor manufactured in this State unless the manufacturer obtains a license or pays a tax or fee when such manufacturer neither imports nor transports such liquor into said state nor sells the same therein; or

(c) prohibit or restrict any licensee in said state from purchasing, or from importing or transporting into said state, alcoholic liquor for the purpose of sale at wholesale therein from any manufacturer or wholesaler in this state, if such licensee may lawfully purchase the same kind of alcoholic liquor for the purpose of resale at wholesale therein from a manufacturer in said state without such restrictions or prohibition; or

(d) impose any different warehousing requirements or higher warehousing fees or inspection fees upon any alcoholic liquor manufactured in this State and imported or transported into such state than is imposed upon the same kind of alcoholic liquor manufactured in such state; or

(e) prohibit any manufacturer or wholesaler in this State or the agents or representatives of either from exercising the privilege of soliciting orders for the sale of alcoholic liquor manufactured in this State to any licensed wholesaler in said State, if the sale is to be made outside thereof, or to any retailer if such orders are to be filled therein by or through a licensed wholesaler in said State, if licensed manufacturers or wholesalers of the same kind of alcoholic liquor in said State or the agents or representatives of either are authorized to solicit orders for the sale of such alcoholic liquor manufactured in said State to licensed wholesalers or retailers; or requires manufacturers or wholesalers in this State, or the agents or representatives of either, to secure a license or pay a fee for said privilege, if no additional license or further fee is required of licensed manufacturers or wholesalers in said State for the privilege of soliciting orders from wholesalers or retailers; or impose upon a manufacturer or wholesaler in this State, or upon the agents or representatives of either, a higher fee for the

privilege of soliciting orders for the sale of alcoholic liquors manufactured in this State than is imposed upon any person therein for the sole privilege of soliciting orders for the sale of the same kind of alcoholic liquor manufactured in said state; or

(f) impose any higher fees or taxes upon alcoholic liquor manufactured in this state when imported, transported, or sold therein than is imposed upon the same kind of alcoholic liquor manufactured and sold within said state; or

(g) impose any higher fee for the privilege of selling or handling any alcoholic liquor manufactured in this state than is imposed for the privilege of handling or selling the same kind of alcoholic liquor manufactured within said state; or

(h) impose any prohibition against or limitations, restrictions, or conditions upon the purchase, sale, or solicitation of orders for the sale of alcoholic liquor manufactured within this state, or upon any person purchasing, soliciting orders for the sale, or selling the same that is not imposed upon the same kind of alcoholic liquor manufactured within such state, or upon persons purchasing, selling, or soliciting orders for the sale of the same; or

(i) impose, directly or indirectly, any other prohibition, restrictions or condition, upon the receipt, possession, disposition, or transportation of alcoholic liquor manufactured in this state, which is not equally imposed upon the same kind of alcoholic liquor manufactured in said state, and in such manner as to place the alcoholic liquor manufactured in this state at a disadvantage in competition therein with the same kind of alcoholic liquor manufactured in said state.

* * *"

"SECTION 1, SUBSECTION (8). The phrase "state in which discrimination exists" means any state of the United States as to which the Attorney General finds and certifies, as herein provided, that discriminatory laws exist, and so long as the certificate remains effective any state so certified by him shall be a "state in which discrimination exists."

"SECTION 4. The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a "state in which discrimination exists" is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any "state in which discrimination exists" as herein defined. * * *"